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6 UNITED STATES DISTRICT COURT  
7 WESTERN DISTRICT OF WASHINGTON  
8 AT SEATTLE

8 RITCHIE BROS. AUCTIONEERS  
9 (AMERICA) INC.,

10 Plaintiff,

11 v.

12 NAEM SUID, et al.,

13 Defendants.

Case No. C17-1481-MAT

ORDER GRANTING PLAINTIFF'S  
MOTION FOR LEAVE TO AMEND  
COMPLAINT

14  
15 INTRODUCTION

16 Plaintiff Ritchie Bros. Auctioneers (America) Inc. ("Ritchie Bros.") filed a Motion for  
17 Leave to Amend Complaint. (Dkt. 41.) In the proposed First Amended Complaint, Ritchie Bros.  
18 names Naem Suid ("Naem") as a defendant, but does not seek to recover any amounts from  
19 Naem's son, Mohammad Suid ("Mohammad"), personally in light of Mohammad's bankruptcy  
20 discharge. (See Dkt. 41-1.) Ritchie Bros. also names the Naem Suid – Mohammad Suid  
21 Partnership ("Partnership") as a defendant, and describes the proposed amendments as providing  
22 a more complete picture of the parties' course of dealings and the Partnership. Ritchie Bros. avers  
23 defendants are jointly and several liable for debts owed, and also liable as joint tortfeasors.

1 Defendants oppose the motion and request oral argument. (Dkt. 42.) The Court, finding oral  
2 argument unnecessary, herein GRANTS Ritchie Bros.’ motion to file an amendment complaint.

### 3 BACKGROUND

4 Naem and Mohammad participated in a live auction conducted by Ritchie Bros. in Orlando,  
5 Florida on February 15, 2016. (See Dkts. 1 & 41-1.) Naem and Mohammad entered into bidder  
6 agreements and, under two different bidder numbers, incurred a total debt of \$575,710.00 in the  
7 purchase of heavy equipment at the auction. As set forth in the proposed amended complaint,  
8 Naem and Mohammad also participated in an auction of real estate conducted by Concierge  
9 Auctions LLC (“Concierge”) at the same auction site and in conjunction with Ritchie Bros. (Dkt.  
10 41-1, ¶ 4.18.) Neither Naem, nor Mohammad tendered payment for their purchases at the auctions.

11 The proposed amended complaint avers that, on or about March 16, 2016, counsel for  
12 Concierge sent a demand letter to Stephen Stone, Naem’s attorney, seeking payment for the real  
13 estate purchases. (*Id.*, ¶ 4.20.) On the following day, March 17, 2016, Stone filed Electronic  
14 Articles of Organization for Suid Trucking, LLC (“Suid Trucking”), naming Naem, Mohammad,  
15 and Omar Suid as members. (*Id.*, ¶ 4.21.) Ritchie Bros. also sent letters to Naem and Mohammad  
16 requesting payment. (See Dkts. 1 & 41-1.) Again, neither individual tendered payment. Ritchie  
17 Bros. thereafter exercised its right to resell the purchased equipment, leaving a total debt in the  
18 principal amount of \$170,205.00. In a July 28, 2017 email directed to Ritchie Bros.’ counsel,  
19 Stone stated Mohammad “became confused” at the auction and utilized Naem’s bidder number to  
20 purchase equipment “for his truck hauling business.” (Dkt. 21, Ex. A; Dkt. 41-1, Ex. F.)

21 Ritchie Bros. filed suit against Naem, Mohammad, and Suid Trucking in September 2017,  
22 alleging breach of contract and action in debt. (Dkt. 1.) The complaint alleged Naem placed his  
23 bids at the auction either personally or through Mohammad, that Mohammad participated in the

1 auction as an agent on behalf of Suid Trucking, and that defendants acted in concert as bidders at  
2 the auction and agreed to be responsible, jointly and severally, for the equipment purchased. (*Id.*,  
3 ¶¶ 4.13, 4.16, 4.17, 5.2)

4 In February 2018, the Court issued an Order granting in part and denying in part  
5 defendants' motion to dismiss. (Dkt. 32.) In its opposition to the motion, Ritchie Bros. informed  
6 the Court of its discovery Mohammad had filed a voluntary petition for bankruptcy on October 10,  
7 2017. Given the inadequacy of the briefing and information offered, the Court denied the motion  
8 to dismiss as to Mohammad and requested input from the parties as to the impact of the automatic  
9 bankruptcy stay. Considering the fact Suid Trucking's March 17, 2016 Articles of Incorporation  
10 contradicted any inference the LLC existed either at the time of the auction or at the time payment  
11 became due, the Court granted the motion and dismissed plaintiff's claims as to Suid Trucking.  
12 The dismissal was without prejudice to the submission of an amended pleading offering evidence  
13 that could support an earlier date of incorporation. The Court also denied the motion to dismiss  
14 all defendants for lack of subject matter jurisdiction and to dismiss Naem for insufficient service  
15 of process, while quashing an attempted service and granting Ritchie Bros. additional time to effect  
16 service on Naem. Relevant to the motion currently under consideration, the Court noted Ritchie  
17 Bros.' argument that Naem and Mohammad had formed a general partnership under Florida law  
18 at the time they placed their bids, and observed that the introduction of this argument could warrant  
19 an opportunity to amend.

#### 20 DISCUSSION

21 In the proposed first amended complaint, Ritchie Bros. avers Naem and Mohammad, at the  
22 time of the auction, acted as business partners who were deemed to have been in a general  
23 partnership under Florida law. (Dkt. 41.1 at ¶ 2.3.) Ritchie Bros. alternatively maintains

1 Mohammad acted as Naem’s agent for all relevant purposes at issue in this dispute. (*Id.*, ¶ 2.2.)  
2 Ritchie Bros. avers defendants acted in concert to make purchases at the auction, that Naem and  
3 Mohammad acted as agents for the Partnership and Mohammad also acted as an agent for Naem,  
4 and that defendants are jointly and severally liable for amounts owing. (*Id.*, ¶¶ 5.2-5.11.) Ritchie  
5 Bros. also avers defendants lacked the intention to comply with the terms of the bidder agreements  
6 and, by sharing bidder numbers and acting as agents for one another, acted in concert to  
7 intentionally and negligently make misrepresentations regarding their intention to be responsible,  
8 jointly and severally, for the items purchased at auction. (*Id.*, ¶ 5.12-5.39.) Ritchie Bros. does  
9 not seek recovery from Mohammad personally and, instead, seeks to recover from Naem, either  
10 because of his partnership with Mohammad or because Mohammad was Naem’s agent, and  
11 because Naem acted in concert with Mohammad to misrepresent facts to Ritchie Bros.

12 Federal Rule of Civil Procedure 15 provides that the Court “should freely give leave [to  
13 amend a pleading] when justice so requires.” Fed. R. Civ. P. 15(a). Granting leave to amend  
14 serves the purpose of Rule 15 to “facilitate decision on the merits, rather than on the pleadings or  
15 technicalities.” *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015) (internal quotation  
16 marks and quoted case omitted). The rule should, therefore, be interpreted and applied with  
17 “extreme liberality.” *Morongo Band of Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir.  
18 1990).

19 Leave to amend may be denied where there is undue delay, bad faith or dilatory motive,  
20 undue prejudice to the opposing party, or when the amendment would be futile. *See Foman v.*  
21 *Davis*, 371 U.S. 178, 182 (1962). Courts also frequently consider whether a party previously  
22 amended its complaint. *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990). The  
23 parties here dispute whether these factors argue in favor or against granting plaintiff’s motion to

1 amend. Ritchie Bros. also requests that the Court strike defendants' over-length opposition. The  
2 Court, for the reasons set forth below, will consider defendants' opposition, but finds no basis for  
3 denying plaintiff the opportunity to amend.

4 A. Over-Length Opposition

5 Defendants filed an opposition exceeding the applicable twelve-page limitation, without  
6 seeking leave of the Court. Local Civil Rule (LCR) 7(e)(4), (f), (g). Plaintiff asks the Court to  
7 strike the opposition in its entirety. This is not the first instance in which defendants filed over-  
8 length briefing. (*See* Dkt. 32 at 4, n.3 (noting an original and revised reply were both over-length  
9 and submitted without a motion to file an over-length brief).) Given its interest in considering  
10 both sides of the dispute, the Court will again accept the approximately one-page over-length brief.  
11 *See* LCR 7(e)(6) ("Captions, tables of contents, tables of authorities, signature blocks, and  
12 certificates of service need not be included within the page limit.") However, defendants are  
13 advised any future briefing submitted to the Court in excess of the applicable page limitation, and  
14 without Court approval, will not be considered.

15 B. Prior Amendment and Undue Delay

16 Plaintiff herein presents its first request to file an amended complaint. Plaintiff requested  
17 this opportunity to amend less than six months after filing its original complaint and just six weeks  
18 after the Court issued its Order denying defendants' motion to dismiss and indicating an  
19 opportunity to amend may be appropriate. During those six weeks, the parties provided briefing  
20 requested by the Court, twice stipulated to extension of case deadlines, and Ritchie Bros. advised  
21 the Court and defendants of its intention to file an amended complaint. (*See* Dkts. 33-40.) There  
22 was, in short, no undue delay in the request to file a first amended complaint.

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1 C. Bad Faith or Dilatory Motive

2 Bad faith, considered in the context of a motion to amend, “means acting with intent to  
3 deceive, harass, mislead, delay, or disrupt.” *Wizards of the Coast LLC v. Cryptozoic Entm’t LLC*,  
4 309 F.R.D. 645, 651 (W.D. Wash. 2015). As defined in other contexts, “‘bad faith’ means more  
5 than acting with bad judgment or negligence, but ‘rather it implies the conscious doing of a wrong  
6 because of dishonest purpose or moral obliquity. . . . [I]t contemplates a state of mind affirmatively  
7 operating with furtive design or ill will.’” *Id.* (quoting *United States v. Manchester Farming*  
8 *P’ship*, 315 F.3d 1176, 1185 (9th Cir. 2003)).

9 Defendants assert plaintiff’s bad faith and give, as an example, the failure to withdraw the  
10 complaint against Mohammad despite his discharge in bankruptcy. Defendants also maintain the  
11 inclusion of dilatory allegations not germane to any claims asserted. They specifically cite to  
12 amendments discussing Mohammad’s certification in the bankruptcy proceedings that his debts  
13 were not primarily consumer debts, and that he did not own a business or have ownership interests  
14 in any business enterprises, including any sole proprietorship, limited liability company (LLC), or  
15 limited liability partnership, during the preceding four years. (Dkt. 41-1, ¶ 4.31 and Ex. G.)

16 There is no evidence plaintiff acted with the intent to deceive, harass, mislead, delay, or  
17 disrupt, or with any dilatory motive. Plaintiff named Mohammad as a defendant before  
18 Mohammad filed for bankruptcy and it was plaintiff, not defendants, who ultimately advised the  
19 Court as to the existence of the bankruptcy filing and stay. Plaintiff now seeks to file an amended  
20 complaint that does not name Mohammad as a defendant and clarifies plaintiff does not seek to  
21 recover any unpaid debts from Mohammad personally in light of his bankruptcy discharge. (Dkt.  
22 41-1 at 1-4 & n.1.) The information contained in Mohammad’s bankruptcy filing is pertinent to  
23 plaintiff’s contentions of contradictory statements and arguments as to the responsibility for debts

1 owed, and the existence of a business or business relationship involving Naem and Mohammad  
2 during the events at issue. (*See, e.g.*, Dkt. 41 at 7-8.) The proposed amendments are, moreover,  
3 fully consistent with the Court’s rulings and observations in the Order addressing defendants’  
4 motion to dismiss. The Court finds no bad faith or dilatory motive.

5 D. Undue Prejudice to Opposing Party

6 Undue prejudice to an opposing party carries the “greatest weight” in the consideration of  
7 a motion to amend. *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1052 (9th Cir. 2003)  
8 (“Prejudice is the ‘touchstone of the inquiry under rule 15(a).’”) (cited and quoted cases omitted).  
9 Prejudice may arise from the introduction of new allegations requiring additional discovery or  
10 delay, *Sharper Image Corp. v. Target Corp.*, 425 F. Supp. 2d 1056, 1080 (N.D. Cal. 2006), or  
11 “‘undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part  
12 of the other party.’” *Wizards of the Coast LLC*, 309 F.R.D. at 651 (quoted cases omitted). The  
13 non-moving party bears the burden of demonstrating prejudice and must do more than merely  
14 assert prejudice, it must show unfair disadvantage or deprivation of the opportunity to present facts  
15 or evidence that could have been offered with timely amendments. *Id.*

16 This case remains at an early stage in the proceedings. The parties have repeatedly  
17 stipulated to extension of the initial case deadlines and have not commenced discovery. (*See* Dkts.  
18 15, 24, 30, 35, 39.) Even now, it remains unclear where Naem is domiciled or whether he has been  
19 served with the complaint. (*See* Dkt. 41-1, ¶ 4.33; and *compare* Dkt. 22 at 5, *with* Dkt. 41-1, Ex.  
20 H.) The timing of the proposed amended complaint would not unduly prejudice defendants. *See,*  
21 *e.g., DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 187-88 (9th Cir. 1987) (“Given that this case  
22 is still at the discovery stage with no trial date pending, nor has a pretrial conference been  
23 scheduled, there is no evidence that [the defendant] would be prejudiced by the timing of the

1 proposed amendment.”)

2 Nor would the inclusion of the partnership allegation or any other additions or alterations  
3 in the first amended complaint unfairly disadvantage defendants or deprive them of the opportunity  
4 to present a complete response. In the original complaint, plaintiff alleged Naem and Mohammad  
5 acted in concert in making bids at the auction and were jointly and severally liable for their debts  
6 owed. (Dkt. 1, ¶¶ 4.17, 5.2.) Plaintiff proffered the partnership theory not long after filing the  
7 original complaint and in response to defendants’ motion to dismiss and the Court’s Order  
8 addressing that motion. The additional detail included in the amended complaint, rather than  
9 burdening defendants, provides for a better understanding of all of the claims advanced.  
10 Defendants do not, therefore, meet their burden of demonstrating undue prejudice. *Cf. Morongo*  
11 *Band of Mission Indians*, 893 F.2d at 1079 (“The new claims set forth in the amended complaint  
12 would have greatly altered the nature of the litigation and would have required defendants to have  
13 undertaken, at a late hour [(nearly two years after filing)], an entirely new course of defense.”).

14 E. Futility

15 A proposed amendment may be denied where “‘it would be futile in saving the plaintiff’s  
16 suit.’” *Chinatown Neighborhood Ass’n v. Harris*, 794 F.3d 1136, 1144 (9th Cir. 2015) (quoted  
17 case omitted). As such, the general rule allowing amendment of pleadings “does not extend to  
18 cases in which any amendment would be an exercise in futility, . . . or where the amended  
19 complaint would also be subject to dismissal[.]” *Steckman v. Hart Brewing, Inc.*, 143 F.3d 1293,  
20 1298 (9th Cir. 1998) (cited cases omitted).

21 Defendants assert futility through plaintiff’s attempt to amend with claims contradictory to  
22 those raised in the original suit. *See, e.g., United States v. Corinthian Colls.*, 655 F.3d 984, 995  
23 (9th Cir. 2011) (“Leave to amend is warranted if the deficiencies can be cured with additional



1 allegations that are ‘consistent with the challenged pleading’ and that do not contradict the  
2 allegations in the original complaint.”) (quoted case omitted). They contend plaintiff now alleges  
3 Naem and Mohammad acted as partners, while previously alleging they acted and were responsible  
4 independently in relation to their bidder registration agreements and debts.

5 Defendants’ argument lacks merit. Again, plaintiff alleged in the original complaint that  
6 Naem and Mohammad acted in concert as bidders at the auction and were jointly and severally  
7 liable. In opposing defendants’ motion to dismiss, plaintiff argued Naem and Mohammad had  
8 formed a general partnership under Florida law at the time they placed their bids. Plaintiff properly  
9 seeks to amend its pleading to conform to the parties’ arguments and the Court’s ruling on the  
10 motion to dismiss. *See, e.g., Desertrain v. City of L.A.*, 754 F.3d 1147, 1154-55 (9th Cir. 2014)  
11 (district court erred in failing to construe argument raised at summary judgment as a motion to  
12 amend and abused its discretion in failing to amend the complaint to conform to the evidence and  
13 argument and in not considering the claim on the merits).

14 Defendants assert plaintiff’s inability to establish the existence of a partnership under any  
15 set of facts. They further argue that, even if a partnership were presumed to exist, the principals  
16 of agency would govern liability and plaintiff would not succeed in establishing an agency  
17 relationship between Naem and/or Mohammad and/or the Partnership for the same reasons the  
18 Court previously relied upon in disposing of plaintiff’s claims with respect to Suid Trucking. (*See*  
19 *Dkt. 42 at 8-12.*) They provide declarations from Naem and Mohammad refuting the existence of  
20 a partnership or agency relationship. (*Id.* at 16-17.)

21 The Court is not persuaded the amendment of the pleading with allegations of a partnership  
22 would be an exercise in futility. Naem and Mohammad purchased a considerable amount of heavy  
23 equipment at auction, equipment typically used in a commercial enterprise and not reasonably

1 considered as intended for personal or household use. (Dkt. 41-1, Ex. C (invoice for purchase of  
2 5 wheel loaders, a portable generator set, 3 mechanics trucks, 1 utility truck, and 2 hydraulic  
3 excavators) and Ex. D (invoice for purchase of 6 scissor lifts, 12 personnel lifts, and 4 dump  
4 trucks).) According to the amended pleading, they proceeded to register an LCC on the day after  
5 they were first pursued for debts incurred at auction. (*Id.*, ¶¶ 4.20-4.21.) Plaintiff was subsequently  
6 advised Mohammad had utilized the bidding number assigned to Naem to purchase equipment for  
7 his “trucking business,” a business that was not, at the time of the auction, registered as an LLC.  
8 (*Id.*, ¶ 4.26.) These and other facts and allegations raise questions regarding the existence and  
9 nature of a business relationship between Naem and Mohammad at the time of the auction.

10 Defendants also assert the futility of plaintiff’s tort claims. They argue the “independent  
11 duty doctrine” bars a claim of misrepresentation relating to the breaching party’s performance of  
12 a contract. *See Eastwood v. Horse Harbor Found., Inc.*, 170 Wn.2d 380, 389, 241 P.3d 1256  
13 (Wash. 2010) (under the doctrine, “[a]n injury is remediable in tort if it traces back to the breach  
14 of a tort duty arising independently of the terms of the contract.”; “When no independent tort duty  
15 exists, tort does not provide a remedy.”), and *Wadlington v. Cont’l Med. Servs., Inc.*, 728 So. 2d  
16 352, 353 (Fla. Dist. Ct. App. 1999) (“misrepresentations relating to the breaching party’s  
17 performance of a contract do not give rise to an independent cause of action in tort, because such  
18 misrepresentations are interwoven and indistinct from the heart of the contractual agreement.”)  
19 (quoted case omitted). Defendants also contend plaintiff fails to allege a false representation as to  
20 a “presently existing fact,” which is a “prerequisite to a misrepresentation claim.” *Donald B.*  
21 *Murphy Contractors v. King Cty.*, 112 Wash. App. 192, 197-98, 49 P.3d 912 (2002). They argue  
22 plaintiff seeks to plead only a promise of future conduct – contractual acceptance – by signing the  
23 agreements. (*See* Dkt. 41-1, ¶¶ 5.13, 5.27 (defendants falsely represented they “intended to be

1 bound” by the agreements) and ¶¶ 5.14, 5.28 (defendants made such representations both by  
2 signing the agreements and by using their bidder registration numbers).)

3 Defendants do not, however, adequately address applicable state law. As plaintiff  
4 observes, neither Washington, nor Florida law<sup>1</sup> bars misrepresentation claims that are  
5 “independent of the contract,” such as “a misrepresentation which induces the party to enter into  
6 the contract.” *Vesta Constr. & Design, L.L.C. v. Lotspeich & Assocs.*, 974 So. 2d 1176, 1181-82  
7 (Fla. Dist. Ct. App. 2008); *accord Donatelli v. D.R. Strong Consulting Eng’rs, Inc.*, 179 Wash. 2d  
8 84, 96, 312 P.3d 620 (2013) (the independent duty doctrine did not bar a claim for negligent  
9 misrepresentation “because the duty to avoid misrepresentations that induce a party to enter into a  
10 contract arises independently of the contract.”) *See also Superwood Co. v. Slam Brands, Inc.*, No.  
11 C12-1109-JLR, 2013 U.S. Dist. LEXIS 116239 at \*15-16 (W.D. Wash. Aug. 15, 2013) (“The  
12 Washington Supreme court has already said that the independent duty doctrine does not, as a  
13 general matter, bar claims for negligent misrepresentation, *Eastwood*, 241 P.3d at 1261, or for  
14 fraud, [*Elcon Constr., Inc. v. E. Wash. Univ.*, 174 Wash. 2d 157, 165-66, 273 P.3d 965 (2012)]);<sup>2</sup>  
15 *Wadlington*, 728 So. 2d at 353 (claims of fraud in the inducement and negligent misrepresentation  
16 independent of the breach of contract are not barred). Plaintiff here alleges defendants  
17 misrepresented their intentions to induce Ritchie Bros. to allow them to participate at the auction.

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19 <sup>1</sup> While citing both Washington and Florida law, the parties appear to agree Washington law applies  
20 to the state law claims. (*See* Dkt. 42 at 12, n.8 and Dkt. 43 at 5, n.5.)

21 <sup>2</sup> In Washington, the independent duty doctrine is limited to a “narrow class of cases, primarily . .  
22 . claims arising out of construction on real property and real property sales[,]” has been applied ““based  
23 upon policy considerations unique to those industries[,]” and has never been applied ““as a rule of general  
application outside of these limited circumstances.”” *Elcon Constr., Inc.*, 174 Wash. 2d at 165-66 (quoting  
*Eastwood*, 170 Wn.2d at 416 (Chambers, J., concurring)). The Washington Supreme Court directs lower  
courts “not to apply the doctrine to tort remedies ‘unless and until this court has, based upon considerations  
of common sense, justice, policy and precedent, decided otherwise.’” *Id.* (quoting *Eastwood*, 170 Wn.2d  
at 417 (Chambers, J., concurring)).

1 (Dkt. 41-1, ¶¶ 5.18, 5.32.)

2 Plaintiff also alleges defendants made misrepresentations knowing they did not intend to  
3 comply with the terms of the agreements. (Dkt. 41-1, ¶¶ 5.16, 5.30.) Both Washington and Florida  
4 law provide that such misrepresentation of a speaker's state of mind satisfies the "existing fact"  
5 requirement. *See Beckendorf v. Beckendorf*, 76 Wash. 2d 457, 462-63, 457 P.2d 603 (1969)  
6 ("[W]hile a mere unfulfilled promise cannot constitute fraud, a promise made with no intention of  
7 keeping it is a 'misrepresentation of an existing fact' – the speaker's state of mind – and may be  
8 the basis of an action in fraud if the other elements are present."); *Markov v. ABC Transfer &*  
9 *Storage Co.*, 76 Wn.2d 388, 396, 457 P.2d 535 (1969) (future promises may be actionable as  
10 misrepresentations where "made for the purpose of deceiving and with no intention to perform,"  
11 or "made without care or concern whether it will be kept."); and *Wadlington v. Cont'l Med. Servs.*,  
12 907 So. 2d 631, 632-33 (Fla. Dist. Ct. App. 2005) ("An exception to th[e] general rule [requiring  
13 an existing fact] is that 'where the promise to perform a material matter in the future is made  
14 without any intention of performing or made with the positive intention not to perform' a cause of  
15 action for fraud may proceed to a jury.") (quoted case omitted). Defendants, for this reason and  
16 for the reasons stated above, fail to demonstrate futility in the proposed amendments.

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1 CONCLUSION

2 Plaintiff's Motion for Leave to Amend Complaint (Dkt. 41) is GRANTED. The Clerk is  
3 directed to lodge the First Amended Complaint (Dkt. 41-1) on the docket, and to send a copy of  
4 this Order to the parties.

5 DATED this 17th day of April, 2018.

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8 Mary Alice Theiler  
9 United States Magistrate Judge  
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